

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (CINCINNATI)**

VICKI LINNEMAN, <i>et al.</i>	:	CASE NO. 1:15-cv-748
	:	
Plaintiffs,	:	(Judge Susan J. Dlott)
	:	(Magistrate Judge Karen L. Litkovitz)
v.	:	
	:	
VITA-MIX CORPORATION, et al.,	:	
	:	
Defendants.	:	

MOTION FOR LEAVE TO FILE A SURREPLY *INSTANTER*

Pursuant to Federal Rule of Civil Procedure 7(b) and Southern District of Ohio Local Civil Rule 7.2(a)(2), Defendants Vita-Mix Corporation, Vita-Mix Management Corporation, and Vita-Mix Manufacturing Corporation (“Defendants”) through undersigned counsel, hereby move this Court for leave to file *instante* the attached Surreply in Support of Final Approval of Class Action Settlement. Pursuant to Local Rule 7.3(b), Defendants conferred with Class Counsel on this matter, and Class Counsel indicated that they do not take a position with respect to Defendants’ Request for Leave. Defendants state the following good cause to grant its Motion for Leave:

1. Plaintiffs filed a Reply in Support of Plaintiffs’ Motion for Final Approval of Class Action Settlement (Doc. 71) and on the same date filed Affidavits of Jeffrey Goldenberg (Doc. 73), Robert D. Moss (Doc. 74). These affidavits purport to offer testimony about the testing of Vita-Mix blenders.

2. Plaintiffs also filed a Notice of Filing Plaintiffs’ Reply in Support of Motion for Final Approval of Class Action Settlement, with Updated Record Citations (Doc. 79), along with

a Second Affidavit of W.B. Markovits (Doc.78) with 26 exhibits, purporting to provide substantiation of Plaintiffs' new arguments within the Reply.

3. In the Reply, Plaintiffs argue for the first time that Defendants' corporate response to the flecking issue was "deceptive" and that Defendant Vita-Mix "changed its story." (Doc. 79, Reply, PageID #3420-3423, pgs. 2-5).

4 Plaintiffs also make an argument related to the initial non-flecking replacement seal, purportedly supported by an exhibit showing seal life hour testing. (Doc. 79, Reply, PageID #3420, pg. 2).

Defendants respectfully submit that a surreply is necessary to allow Defendant to address the arguments and facts that are raised in the Reply that they have not had an opportunity to address. See *Mauer v. Deloitte & Touche*, 752 F. Supp. 2d 819, 824 (S.D. Ohio 2010) (granting motion to file surreply outlining types of issues that may be properly addressed in surreply). Although the Federal Rules of Civil Procedure do not expressly permit the filing of surreplies, "such filing may be allowed in appropriate circumstances, especially 'when new submission and/or arguments are included in a reply brief, and a non-movant's ability to respond to the new evidence has been vitiated.'" *Key v. Shelby County*, 551 Fed. App'x 262, 265 (6th Cir. 2014), quoting *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 481 (6th Cir.).

Defendants submit that the appropriate circumstances exist here, and respectfully move for leave to file *Instantly* the Surreply attached to this motion which addresses the new arguments and facts raised in the Reply.

Respectfully submitted,

s/ Carolyn A. Taggart

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2018, a copy of the foregoing Motion for Leave to File a SurReply *Instante* was served via this Court's CM/ECF system on counsel of record for the parties.

s/ Carolyn A. Taggart

Carolyn A. Taggart